



November 7, 2002

Mr. Brad Norton  
Assistant City Attorney  
City of Austin - Law Department  
P.O. Box 1088  
Austin, Texas 78767-8845

OR2002-6355

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 171911.

The City of Austin (the "city") received a request for the following six categories of information: zoning approval applications pertaining to Stratus Properties ("Stratus"); correspondence relating to two named Stratus properties; correspondence relating to high occupancy vehicle lanes on two named roadways; correspondence related to utility service; correspondence related to the construction of a Lower Colorado River Authority water treatment facility; and correspondence related to a named roadway. You state that "much of the requested information has been or will be released." However, you claim that some of the requested information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103 of the Government Code provides in part:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

[...]

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that raises section 552.103 must provide relevant facts and documents sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for the information and (2) that the requested information is related to the litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. - Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. - Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.* For the purposes of section 552.103(a), litigation includes civil lawsuits, criminal cases, and contested cases under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code. *See* Open Records Decision No. 588 (1991); *see also* Open Records Decision Nos. 556 (1990), 368 (1983), 301 (1982).

In this instance, you state that the information in question relates to pending administrative litigation to which the city is a party. You submit documentation showing that the proceeding is a contested case under the APA that was pending at the time of the request. You further state that the pending litigation "relates to the City's application for a certificate of convenience and necessity for its Water and Wastewater system." However, you have not identified the issues in the litigation or explained how the information relates to these issues. *See* Open Records Decision No. 638 at 4 (1996). Thus, after consideration of the totality of the circumstances, we find that you have not adequately demonstrated how the submitted information relates to the pending litigation; therefore, the city may not withhold this information under section 552.103. *See id.*

You also assert that the submitted information is excepted from disclosure under section 552.111 as attorney work product. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was (1) created for trial or in anticipation of civil litigation, and (2) consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. *Id.* In order for this office to conclude that information was created in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery

believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.

*See National Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993)). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204.

The second requirement that must be met is that the work product "consists of or tends to reveal the thought processes of an attorney in the civil litigation process." Open Records Decision No. 647 at 4 (1996). Although the attorney work product privilege protects information that reveals the mental processes, conclusions, and legal theories of the attorney, it generally does not extend to facts obtained by the attorney. *Id.* After careful review of your arguments and the submitted information, we find that you have not established that the submitted information was created in anticipation of litigation. Consequently, you may not withhold the information in question under section 552.111 in conjunction with the work product privilege. Accordingly, the city must release the entirety of the submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free,

at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



V.G. Schimmel  
Assistant Attorney General  
Open Records Division

VGS/seg

Ref: ID# 171911

Enc: Submitted documents

c: Mr. Colin Clark  
P.O. Box 684881  
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(w/o enclosures)